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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

GEORGE WHITE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WADE H. McCREE, Jr.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
SARA SUN BEALE,
Assistant to the Solicitor General,
WILLIAM KANTER,
JOHN M. ROGERS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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v.

GEORGE WHITE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–18A) is reported at 559 F. 2d 852. The opinion of the district court (App. C, *infra*, pp. 21A–40A) is not reported.

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JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 19A) was entered on July 18, 1977. On October 6, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including November 15, 1977, and on November 8, 1977, he further extended the time to and including December 15, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether applicants for disability benefits under Title II of the Social Security Act are entitled by statute to an administrative hearing within the fixed periods of time arbitrarily set by the district court.

2. Whether the district court had jurisdiction over this case under 28 U.S.C. 1361, notwithstanding the jurisdictional bar imposed by Section 205(h) of the Social Security Act.

STATUTORY PROVISIONS INVOLVED

Section 205 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. (Supp. V) 405, provides in pertinent part:

> (b) The Secretary is directed to make findings of facts, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or

> parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. Any such request with respect to such a decision must be filed sixty day after notice of such decision is received by the individual making such request. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.
>
> * * * * *
>
> (h) The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof

shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

STATEMENT

1. Section 205(b) of the Social Security Act, 42 U.S.C. (Supp. V) 405(b), requires the Secretary of Health, Education, and Welfare to provide claimants with "reasonable notice and [an] opportunity for a hearing" with respect to "decisions as to the rights of any individual applying for a payment" of Social Security benefits. Pursuant to this statute, the Secretary has provided that when an initial decision is made to deny or terminate benefits, a claimant may obtain administrative review at three levels: reconsideration; an evidentiary hearing before an Administrative Law Judge (ALJ); and final review by the Appeals Council. 20 C.F.R. 404.901 to 404.955. After exhausting these administrative remedies, a claimant may secure judicial review in a federal district court under Section 205(g) of the Act. See generally *Mathews* v. *Eldridge*, 424 U.S. 319, 338–339; *Califano* v. *Sanders*, 430 U.S. 99, 101–102.

The large backlog in pending claims has resulted in significant delays in the process of administrative review, and these delays have been particularly pronounced at the second level or review, *i.e.*, between a claimant's request for a hearing before an ALJ and issuance of the ALJ's decision following such hearing. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 341–342. The backlog has been swollen by what the court of appeals aptly described as a "flood" of new claims immediately following the enactment of legislation establishing the black lung and supplemental security income programs (App. A, *infra*, p. 13A).[1] As the court of appeals further noted, the Secretary has encountered difficulties in increasing the hearing staff, and "legislative obstacles" have hindered the efficient use of available hearing officers (*ibid.*; see generally, App. E, *infra*, pp. 46A–57A for a brief description of these problems).[2]

[1] Section 414(b) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 745, as amended by Section 5(1), of the Black Lung Benefits Act of 1972, 86 Stat. 155, 30 U.S.C. (Supp. V) 924 (b) gave the Social Security Administration temporary jurisdiction over the black lung program (covering only claims filed before June 30, 1973), resulting in 113,707 requests for hearings through fiscal year 1976. The workload of the Administration's Bureau of Hearings and Appeals (BHA) was again increased when the supplemental security income (SSI) program went into effect on January 1, 1974. See 42 U.S.C. (Supp. V) 1381 *et seq.* Meanwhile, the number of requests for hearings before BHA increased sharply from 42,573 in fiscal year 1970 to 121,504 in fiscal year 1974 when respondent filed this action. See Operational Analysis of the Bureau of Hearings and Appeals, Department of Health, Education, and Welfare, Social Security Administration 28 (1977) (BHA Publication No. 032(6–77)). Requests for hearings rose to 154,962 in fiscal year 1975 (*ibid.*), and we are informed by the Secretary that there were 193,829 requests in fiscal 1977.

[2] These factors contributed to a backlog that reached an all-time high of 113,000 pending requests for hearings in April 1975 (App. E, *infra*, p. 51A). Various measures, including the hiring of additional ALJs, support personnel, and professional support staff, resulted in an increase in the average number of dispositions per ALJ during a four-week period from 14.8 in the Fall of 1974 to 27 by March 1977. These measures, which are more fully described in Appendix E, *infra*, helped to reduce the number of pending cases to 81,500 in January 1977. We are informed by the Secretary, however, that new hearing requests, which reached a record high of 18,000 per month in March 1977, had increased the number of pending cases again to 91,143 by the close of fiscal year 1977.

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2. Respondent George White initially was awarded disability benefits beginning in January 1973 (App. A, *infra,* p. 3A). When the responsible state agency[3] reexamined the case, however, it found that respondent's disability had ceased in November 1973 and that his benefits therefore should be terminated as of January 1974 (*id.* at 3A–4A; see *Mathews* v. *Eldridge, supra,* 424 U.S. at 338). The Social Security Administration affirmed that determination upon reconsideration. Thereafter, on July 29, 1974, respondent requested a hearing before an ALJ (*id.* at 4A). The hearing was held on April 29, 1975, and on May 21, 1975, the ALJ issued a decision adverse to respondent (*ibid.*). In December 1975, the Appeals Council, finding that respondent's disability had not ended, reversed the ALJ and restored his benefits retroactively (*ibid.*).

In the meantime, however, in January 1975, respondent had filed this action in the United States District Court for the District of Connecticut, seeking declaratory and injunctive relief against the delay in the scheduling of his hearing (*ibid.*). In March 1975, respondent moved for certification of the suit as a class action (*ibid.*). On July 18, 1975, after respondent had received the ALJ's decision, the district court certified a class of "all potential Social Security Disability recipients, who have pending petitions for a

[3] Continuing eligibility investigations are conducted by a state agency, whose determination is reviewed by an examiner in the Social Security Administration's Bureau of Disability Insurance. See *Mathews* v. *Eldridge, supra,* 424 U.S. at 337–338.

hearing before the Administrative Law Judge and have not had a hearing scheduled promptly and the matter concluded within a reasonable time" (*id.* at 4A, n. 4).

Following cross-motions for summary judgment, the district court ruled that it had jurisdiction under 28 U.S.C. 1361 and that the case was not moot (App. C, *infra,* pp. 29A–35A). The court found that the average time between request for a hearing before an ALJ and entry of the ALJ's decision for the period of January 1973 through March 1975 was 211.8 days for residents of Connecticut and 195.2 days nationally, and it held that these delays were unreasonable and violative of the Social Security Act, the Administrative Procedure Act, and the Due Process Clause of the Fifth Amendment (App. C, *infra,* pp. 21A–24A, 39A).

The district court entered an order limiting the maximum delays between requests by Connecticut residents for a hearing and the corresponding ALJ decision to 180 days by July 1, 1977; to 150 days by December 31, 1977; and to 120 days by July 1, 1978 (App. A, *infra,* p. 5A; App. D, *infra,* pp. 41A–45A).[4] The order also provided that in any case in which the claimant had not received a final decision within the period specified, the Secretary was required to pay

[4] The order provided for an exception from these time periods if the ALJ determined after the hearing that further medical evidence was necessary, or if the claimant failed to appear for a hearing, requested a delay, or caused a delay by his failure to provide essential evidence (App. D, *infra,* p. 42A–43A).

benefits to the claimant until a decision was rendered (App. D, *infra,* p. 43A).

The court of appeals affirmed (App. A, *infra,* pp. 1A–18A). It held that the district court had jurisdiction under 28 U.S.C. 1361, notwithstanding the jurisdictional bar of Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), and it rejected the Secretary's contention that the case had become moot when respondent was afforded a hearing (App. A, *infra,* pp. 5A–10A). The court recognized both the administrative problems confronting the Social Security Administration and the efforts made by the Secretary to reduce hearing delays, but it concluded that Section 205(b) of the Act authorized the imposition of mandatory deadlines and that claimants could not be forced to bear the burden of the delays that persisted despite the Secretary's efforts (*id.* at 13A–14A). The court also sustained, as a proper exercise of remedial power, the district court's order requiring the Secretary to pay benefits pending the ALJ's decision in cases where the deadline imposed by the court is not met (*id.* at 17A). The court declined to decide whether the hearing delays violated either the Administrative Procedure Act or the Due Process Clause (*id.* at 18A, n. 14).

REASONS FOR GRANTING THE PETITION

The decision in this case, especially when considered together with like decisions in similar pending cases, threatens significantly to disrupt the Secretary's ability to administer the Social Security Act nationwide in an even-handed and orderly manner. The administration of the claims procedure established by the Act has been delegated to the Secretary, not to the courts; the remedying of lapses of efficiency in, or of inadequacies in resources for, the general operation of the claims procedure is a matter that is properly reserved to the political process, not the judicial process. The decision below represents an intrusion into the administrative province and interference with the responsibilities of the political branches that warrants this Court's review on certiorari.

1. a. The Secretary, no less thma the courts below, is concerned about the hardships that individuals with meritorious claims may suffer between the time of their request for a hearing and a favorable decision by the ALJ following the hearing. The court's imposition of a mandatory timetable for hearings, however, will only result in making an undeniably difficult situation far worse.

The practical result of the decision below will be to require the Secretary to give claimants in Connecticut priority over claimants in neighboring states, whose hearings as a consequence will be delayed even longer than before. Moreover, this case is one of a number of pending cases in which claimants seek to challenge delays in the administrative process.[5] In a number of

[5] *Barnett* v. *Califano*, D. Vt., No. 74–270, decided February 22, 1976, appeal pending, C.A. 2, No. 77–6166; *Blankenship* v. *Mathews*, W.D. Ky., No. 75–0185 L(A), decided May 6, 1976, appeal pending, C.A. 6, No. 76–2342; *Boyle* v. *Califano*, C.D.

these cases, the courts have devised timetables for the Secretary's adjudication of claims within a particular geographic area; the mandatory time limits vary from case to case, and in some cases, as here, they are accompanied by orders that the Secretary commence paying benefits when the deadline is not met.[6] As a

Cal., No. 77-0466ALS; *Caswell* v. *Califano*, 435 F. Supp. 127 (D. Me.), appeal pending, C.A. 1, No. 77-1514; *Deloney* v. *Mathews*, N.D. Ill., No. 74-2989; *Dixon* v. *Quern*, N.D. Ill., No. 77-C-1125; *Etier* v. *Califano*, N.D. Cal., No. 77-0520-WHO; *Ferguson* v. *Califano*, C.D. Cal., No. 75-2620-RF; *Finch* v. *Califano*, W.D. Ky., No. 76-0441L; *Harris* v *Califano*, N.D. Ga., No. 75-1591A; *Huntzman* v. *Califano*, E.D. Pa., No. 74-2409; *Martinez* v. *Califano*, E.D.N.Y., No. 73-C-900; *Mills* v. *Califano*, N.D. Cal., No. 77-1094-WTS; *Quintana* v. *Califano*, D. N.M., No. 77-622-M; *Santos* v. *Mathews*, D. Mass., No. 75-166G; *Soper* v. *Mathews*, D. Mass., No. 76-3174-G; *Sturgill* v. *Mathews*, E.D. Ky., No. 75-288; *Wright* v. *Califano*, N.D. Ill., No. 75-C-1537, decided November 17, 1977.

[6] In *Blankenship* v. *Mathews*, *supra*, the district court ordered hearings in Title II and certain SSI cases in Kentucky within 90 days of request beginning February 1, 1977. In *Barnett* v. *Califano*, *supra*, the court ordered hearings in Vermont SSI cases within 120 days of request beginning July 1, 1977, and within 90 days beginning January 1, 1978, and payment where hearing requirements are not satisfied. In *Caswell* v. *Califano*, *supra*, the court ordered hearings in Maine Title II cases within 120 days of request by December 31, 1977, and within 90 days by July 1, 1978. In *Wright* v. *Califano*, *supra*, the district court ordered hearing decisions in non-disability Title II cases in Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin within 180 days from request for hearing by January 1, 1978, within 120 days by July 1, 1978, and within 90 days by January 1, 1979, with identical relief for the period of time from request for Appeals Council review to final Appeals Council decision, and the order provides that eligibility is to be presumed where the deadline is not met.

result, the Secretary's efforts to process claims more efficiently nationwide are being made increasingly difficult by a growing patchwork of conflicting time requirements. If this decision is permitted to stand, the situation is likely to grow steadily worse, both because of the precedential effect of the Second Circuit's opinion and because claimants in jurisdictions where no action has yet been brought may be forced to bring suit to prevent the subordination of their claims to those of claimants already protected by court-ordered time limits.

b. Section 205(b) of the Social Security Act—upon which the court of appeals rested its decision—does not justify imposing such an administrative nightmare. Section 205(b) requires only that claimants who disagree with a determination of the Secretary be afforded "reasonable notice and opportunity for a hearing." It establishes no timetable for holding a hearing or rendering a decision after a hearing.

When Congress has wished to impose such time limits, it has done so expressly. For example, Congress has specified that determinations of entitlement to SSI benefits should be made within 90 days after the request for the hearing, except in cases involving a claim of disability. See Section 1631(c)(2) of the Act,

42 U.S.C. (Supp. V) 1383(c)(2).[7] Prompt action with respect to claims for SSI benefits is important because entitlement to such benefits is based upon need; even in this context, however, Congress has recognized that questions relating to disability cannot always be promptly resolved.

With respect to benefits not based upon need, such as the Title II benefits sought by respondent, even though Congress has been fully apprised of the hearing delay problem, it has explicitly refused to impose deadlines. In September and October 1975, the House Subcommittee on Social Security held extensive hearings on the problem of hearing delays. Hearings on Delays in Social Security Appeals before the Subcommittee on Social Security of the House Committee on Ways and Means, 94th Cong., 1st Sess., p. 2 (1975). As a solution to the problem, Representative Seiberling proposed that the Secretary be required to render a final decision within 120 days of a claimant's request for a hearing, but the staff of the Subcommittee cautioned against such an approach (Report of Staff of House Subcommittee on Social Security of the House Committee on Ways and Means, Appeals Process: Areas of Possible Administrative or Legislative Actions, 94th Cong., 1st Sess., pp. 1–2 (Comm. Print 1975)):

> The appeals crisis is almost wholly the creature of the social security and SSI disability programs and although mandating by statute certain processing time limits might seem on the surface a desirable thing to do, such legislation might also have an adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect.

[7] Thus, even if respondent had been claiming SSI rather than Title II benefits, he would not have been entitled to a decision within a fixed period of time, for his claim presents a question of disability.

The Committee later favorably reported on, and Congress passed, Pub. L. 94–202, 89 Stat. 1135, which dealt with the backlog problem by authorizing the Secretary to utilize SSI and black lung hearing examiners to hear Title II cases as necessary, but did not set deadlines for decisions in such cases. See H.R. Rep. No. 94–679, 94th Cong., 1st Sess., p. 4 (1975).

Nowhere in this legislative history is there a suggestion that Congress believed that it already had provided for the equivalent of such deadlines in Section 205(b). Cf. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380–381.[8]

[8] Moreover, the portion of the decision below that requires payment of benefits to begin if the Secretary does not meet the court-imposed deadline contravenes a second expression of congressional intent. Section 205(i) of the Act requires that there be a "final decision" or "final judgment" that a claimant "is entitled to [a] payment" before certification for benefits. The court's order in this case requires benefits to be paid even though entitlement is not yet established. Although the order provides that such payments are subject to later recoupment, as a practical matter it is unlikely that many of these payments could be recovered. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347. Accordingly, such payments would constitute an unauthorized drain on the Social Security Trust Funds at a time when their solvency is a matter of public concern. Indeed, the prospect of such payments might encourage the filing of groundless claims, which would aggravate the situation further.

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Section 205(b) imposes no deadlines either explicitly or by implication; in devising and imposing deadlines of their own, the courts below departed from the statute and from the evident congressional intention that the problem of hearing delays be resolved by the legislative and executive branches rather than by judicial fiat.

c. Congress chose not to adopt a mandatory timetable in part because artificial time limits pose a threat to the quality of adjudication. In over half of the approximately 200,000 hearings annually held by the Bureau of Hearings and Appeals, the claimants are not represented by counsel. In such cases, the ALJ is charged with the time-consuming responsibility of developing a full record, including obtaining evidence not presented by the claimant. In disability cases in particular, medical records must be obtained and examinations or testimony by medical or vocational specialists may have to be conducted or received. Establishment of fixed time limits could have a serious adverse impact on the accuracy of the determinations based upon such proceedings, harming some claimants who are truly disabled and granting windfalls to some undeserving claimants who may profit from the agency's need to act in haste. The courts below should have deferred to the legislative judgment that these considerations make the imposition of arbitrary deadlines inadvisable.

The judicial imposition of time limits was particularly inappropriate in view of the fact that Congress

is continuing to study the problem.[9] Indeed, in the current Congress at least 11 bills that deal in one way or another with the hearing delay problem have been introduced.[10] This continuing legislative activity further indicates that Congress does not believe that Section 205(b) bears meaningfully upon the problems of backlog and delay that are faced by claimants and the Secretary alike.

2. In any event, the district court lacked jurisdiction to hear his case. Section 205(h) of the Act provides:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or

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[9] The House Committee on Ways and Means recommended that the Social Security Administration authorize the Center for Administrative Justice to initiate a study of the existing appeals procedure in order to recommend possible structural changes in the existing system and has indicated that the Committee will consider the appeals process in this session of Congress. H.R. Rep. No. 94–679, 94th Cong., 1st Sess., p. 2 (1975). This study, which was completed in October of 1977, concludes that "the basic causes of the backlog * * * and the resultant delay[s] are increasing demand[s] for hearings without a corresponding increase in the resources available to process the cases." Center for Administrative Justice, Final Report: Study of the Social Security Administration Hearing System xix (1977). The report cautions that "[s]ubstantial changes to speed decisionmaking, other than the commitment of more resources to the task, almost always run the risks of lowering the quality of the process in other respects" (*id.* at xx; see also p. 11).

[10] H.R. 1518, 95th Cong., 1st Sess. (January 10, 1977); H.R. 2394 (January 26, 1977); H.R. 2671 (January 31, 1977); H.R. 2815 (February 1, 1977); H.R. 4303 (March 2, 1977); H.R. 5072 (March 15, 1977); H.R. 5151 (March 16, 1977); H.R. 5656 (March 28, 1977); H.R. 5723 (March 29, 1977); H.R. 6495 (April 21, 1977); H.R. 8076 (June 28, 1977).

> governmental agency except as * * * provided [by Section 205(g)]. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under [Title II of the Social Security Act].

The final sentence of that provision barred the district court from exercising jurisdiction over respondent's complaint, which asserts a claim arising under Title II.

The court of appeals, relying upon its earlier decision in *Frost* v. *Weinberger*, 515 F. 2d 57 (C. A. 2), certiorari denied, 424 U.S. 958, held that Section 205(h) does not preclude the exercise of mandamus jurisdiction under 28 U.S.C. 1361. But that holding is inconsistent with this Court's determination that Section 205(g) is the exclusive source of jurisdiction in social security cases,[11] and that "[o]ther sources of jurisdiction [are] foreclosed by § [2]05(h)." *Weinberger* v. *Salfi*, 422 U.S. 749, 764.[12] See also *Califano*

[11] Since respondent does not seek review of any "final decision of the Secretary," but rather challenges the delays in the administrative process prior to the Secretary's decision on his claim, Section 205(g) provides no basis for jurisdiction. This Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319, is not to the contrary. In that case, the Court concluded that the Secretary's decision in terminating benefits without a prior hearing was sufficiently final to permit review of a claim that a prior hearing should have been provided. Here, however, the crux of respondent's claim is that delays in the administrative process hindered his ability to secure a decision by the Secretary.

[12] The plaintiffs in *Salfi* had predicated jurisdiction on, *inter alia*, 28 U.S.C. 1361. See *Weinberger* v. *Salfi*, No. 74-214, Appendix, p. 7.

v. *Sanders*, 430 U.S. 99, 109–111 (concurring opinion of Mr. Justice Stewart).[13]

Although the effect of the jurisdictional bar of Section 205(h) is to deprive the courts of power to oversee the general efficiency with which the Secretary fulfills his duty to administer the claims procedure under the Social Security Act, that is not an inappropriate result. To the contrary, the absence of jurisdiction confirms that Congress understands that it is the responsibility of the political branches, not of the courts, to resolve problems of administration of the kind presented here. Broad policy decisions with respect to the allocation of resources for the nationwide administration of a complex statutory program may appropriately be left to judicially nonreviewable administrative resolution—a resolution that remains subject to review by Congress, which is, in the last analysis, the only branch of government capable of remedying genuine deficiencies in public resources. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134.

[13] The scope of the jurisdictional bar of Section 205(h), and its application to 28 U.S.C. 1361, are further explored in our briefs in *Norton* v. *Mathews*, 427 U.S. 524 (at pp. 13–18), and *Califano* v. *Sanders*, *supra* (at pp. 10–16). We are furnishing copies of these briefs to counsel for respondent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BARBARA ALLEN BABCOCK,
Assistant Attorney General.
SARA SUN BEALE,
Assistant to the Solicitor General.
WILLIAM KANTER,
JOHN M. ROGERS,
Attorneys.

DECEMBER 1977.

APPENDIX A

United States Court of Appeals for the Second Circuit

No. 1127—September Term, 1976

Argued May 23, 1977—Decided July 18, 1977

Docket No. 77-6015

GEORGE WHITE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLEE

against

DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AS AN INDIVIDUAL AND IN HIS OFFICIAL CAPACITY, DEFENDANT-APPELLANT

Before FEINBERG AND DANAHER,[1] Circuit Judges, and DOOLING, District Judge.[2]

FEINBERG, *Circuit Judge:*

The Secretary of the Department of Health, Education and Welfare appeals from a successful challenge by plaintiff George White to the glacial pace at which the Social Security Administration (SSA) has adjudicated claims to disability payments. The United States District Court for the District of Connecticut,

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[1] Of the District of Columbia Circuit, sitting by designation.
[2] Of the Eastern District of New York, sitting by designation.

T. Emmet Claire, *Chief Judge,* found the administrative delays in Connecticut unreasonable, and ordered reductions in those delays according to a schedule whose first stage would become effective July 1, 1977. Under the judgement of the district court, claimants forced to wait for a decision longer than the prescribed maximum periods are to be paid benefits until they are ruled ineligible. On appeal, the Secretary argues that the district court lacked subject matter jurisdiction, that the case is moot, and that in any event the delays should not be held unreasonable in view of extraordinary circumstances that aggravated the administrative burden and in view of Congressional reaction to the problem. We find none of these arguments persuasive and we affirm the order of the district court.

I

A brief description of the statutory scheme will be helpful in understanding the issues before us. The administrative process dealing with claims for disability insurance under Title II of the Social Security Act, 42 U.S.C. § 401 et seq., is quite complex, involving both state and federal agencies. As the Supreme Court explained in *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976), state agencies first determine "whether a disability exists, when it began, and when it ceased. * * * The standards applied and the procedures followed are prescribed by the Secretary * * * who has delegated his responsibilities and powers under the Act to the SSA." To establish disability and maintain his right to continued benefits, a wage earner must adduce "such medical and other evidence of the existence [of the disability] as the Secretary may require," 42 U.S.C. § 423(d)(5), to prove that he can-

not "engage in any substantial gainful activity." 42 U.S.C. § 423(d)(1)(A). This showing is necessary both upon initial application and at continuing-eligibility investigations. The latter periodic inquiries involve a physician and another person trained in disability evaluation, who rely on information obtained from the wage earner himself and from his sources of medical treatment. The state agency may also arrange for an examination by an independent physician.

If the agency concludes, either initially or upon reexamination, that the claimant is not entitled to benefits, he is notified of this tentative conclusion and is given an opportunity to submit additional evidence. The state agency then makes its final determination, which the SSA Board of Disability Insurance reviews. An unsuccessful claimant can seek reconsideration by the state agency, whose decision is again subject to SSA review. A losing claimant is then entitled to a hearing before an administrative law judge, which entails a personal appearance and a full evidentiary proceeding. 42 U.S.C. § 405(b) (1970). Review of the administrative law judge's decision is available at the discretion of the Appeals Council of the SSA Hearings and Appeals Bureau. Thereafter, a claimant can obtain judicial review of an adverse determination under § 205(g) of the Act, 42 U.S.C. § 405(g).

This case only concerns delay at the administrative law judge hearing stage, and the facts regarding the claim of wage earner George White are undisputed. White filed an application for disability insurance benefits in the summer of 1972. He claimed to be totally disabled because of cirrhosis of the liver and acute pancreatitis, and he was awarded benefits beginning in January 1973. The agency reexamined

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White's case later that year, and after receiving a doctor's report, determined that White's disability had ceased in November 1973, and that he was last entitled to benefits for January 1974.

White requested reconsideration, but in early July 1974 he was told that the agency would not change its decision. On July 29, he requested a hearing before an administrative law judge. The hearing did not take place until April 29, 1975, and the administrative law judge issued his decision (adverse to White) on May 21, 1975—about ten months after White's request for a hearing. Subsequently, the Appeals Council of the SSA reviewed the case, took some new evidence, and in December 1975 found that White's disability had not ended in November 1973, but had continued. In December 1975, the SSA reinstated White's benefits and paid him back benefits totalling more than $3,000. At that point, White had not received benefits for almost two years.

In the meantime, however, White had taken further steps to obtain his benefits. In January 1975, while waiting for the hearing he had requested over five months earlier, White filed a class action in the district court, seeking declaratory and injunctive relief against the long hearing delays in Connecticut.[3] In March 1975, White moved for certification of the class, which Judge Clarie granted on July 18, 1975.[4]

[3] The situation in Connecticut was not atypical. See *Wright* v. *Mathews*, Civil No. 75–1537 (N.D. Ill. June 6, 1977); *Barnett* v. *Mathews*, Civil No. 74–270 (D. Vt. Feb. 22, 1977).

[4] The class was certified as "all potential Social Security Disability recipients, who have pending petitions for a hearing before the Administrative Law Judge and have not had a hearing scheduled promptly and the matter concluded within a reasonable time."

In the district court action, both White and the Secretary moved for summary judgment. The Secretary also moved to dismiss the complaint, arguing lack of jurisdiction and mootness. In a thorough opinion, Judge Clarie denied defendant's motions and granted summary judgment for plaintiff and his class.

The judge found that the average time between request for a hearing before an administrative law judge and entry of his final decision for the period of January 1973 through March 1975 was 211.8 days for residents of Connecticut, and 195.2 days nationally. Concluding that these delays were unreasonable and violated the Social Security Act, the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and the due process clause, the judge ordered that maximum delays between request for a hearing and final decision by an administrative law judge be reduced to 180 days after July 1, 1977; to 150 days after December 31, 1977; and to 120 days after July 1, 1978. Claimants who are made to wait longer are to receive benefits automatically from the expiration of the allotted time period until a decision is rendered. The Secretary appeals, arguing that the court had no jurisdiction, that the action is moot, that class certification was improper and that the judge was wrong on the merits.

II

JURISDICTION

Judge Clarie found subject matter jurisdiction under 28 U.S.C. § 1361, which gives district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the

United States or any agency thereof to perform a duty owed to the plaintiff." In *Frost* v. *Weinberger*, 515 F. 2d 57 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976), we held that 28 U.S.C. § 1361 was a sufficient predicate for district court jurisdiction over an action to require the SSA to provide an evidentiary hearing before terminating survivors' benefits under the Act. The analogy to this case is clear, and recent Supreme Court cases seem to leave open the possibility that relief can be available here under § 1361. See *Norton* v. *Mathews*, 427 U.S. 524, 529–30 (1976); *Mathews* v. *Eldridge*, 424 U.S. 319, 322 n. 12 (1976).

Appellant does not attempt to distinguish *Frost*, but argues that the Social Security Act itself precludes mandamus review. Section 205(g), reproduced in the margin,[5] alows a claimant to obtain judicial relief only after a final agency decision. And § 205(h) provides: "No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided." Appellant claims that this preclusion includes § 1361, because otherwise the requirement of § 205(g) for exhaustion of administrative remedies would be circumvented. Appellant cites *RoAne* v. *Mathews*, 538 F. 2d 852 (9th Cir. 1976),

[5] Section 205(g) provides, in pertinent part: "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia."

as authority. But in that case, plaintiffs attempted to invoke § 1361 to gain premature judicial review of the question whether they qualified for social security benefits. This action, on the other hand, does not affect the merits of the underlying statutory issue—whether claimants in White's class are entitled to benefits—that will ultimately be subjected to the administrative process. Here, the district court was asked merely to require the agency to conduct its proceedings with reasonable speed. As will be seen below, the agency has a clear obligation under the statute to do so. The Secretary argues that mandamus is inappropriate because the timing of a hearing rests in his discretion. But the scope of the Secretary's discretion is the very issue before us, since we do not believe that he has discretion to deny a reasonable opportunity for a hearing. See Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Notstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 354 (1967). Under these circumstances, we follow *Frost* and hold that the district court properly predicated jurisdiction on § 1361.[6] This conclusion leaves § 205(g) undisturbed as the exclusive avenue to the courts for a claimant seeking to challenge the merits of an SSA denial of benefits under the Act. See *Califano* v. *Sanders*, 45 U.S.L.W. 4209 (Feb. 23, 1977); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

[6] This conclusion makes it unnecessary for us to consider the alternative grounds of jurisdiction advanced by White, namely, 28 U.S.C. § 1331 and 42 U.S.C. § 405(g). In light of *Califano* v. *Sanders*, 45 U.S.L.W. 4209 (Feb. 23, 1977), White abandoned in this court his jurisdictional argument based on the Administrative Procedure Act.

MOOTNESS

Appellant argues to us, as he did below, that this case became moot when White received his hearing and decision from the administrative law judge. The complaint sought only declaratory relief and a mandatory injunction to compel the scheduling of a hearing. White's hearing before an administrative law judge in April 1975 thus ended his individual controversy with the SSA over the issue in this case. In appellant's view, that barred continuation of this action, despite the fact that White filed it as a class action. Judge Clarie did not certify the class until July 18, 1975, almost three months after the hearing before the administrative law judge. The argument is that White's case became moot before the class was certified, and "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea* v. *Littleton,* 414 U.S. 488, 494 (1974).

There is, however, no question that White had alleged a substantial controversy when he filed suit in January 1975, and nothing had changed his position when he moved for class certification in March of that year. The existence of a controversy at that point was sufficient, on the facts of this case, to enable this suit to proceed as a class action. In *Sosna* v. *Iowa,* 419 U.S. 393, 402 n. 11 (1975), the Supreme Court acknowledged the possibility that special allowance may at times be necessary for claims that evaporate as the suit unfolds:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

The question is whether to allow class certification in this case to relate back at least to March 1975, when White moved to certify the class and still had not received a hearing before an administrative law judge. Refusing to do so would mean that the SSA could avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek, but have not yet obtained, class certication, *Cf. Workman* v. *Mitchell,* 502 F. 2d 1201, 1208 (9th Cir. 1974); *Lamont* v. *Postmaster General of the United States,* 229 F. Supp. 913 (S.D.N.Y. 1964) (3-judge court) (dissenting opinion), rev'd, 381 U.S. 301 (1965). We do not suggest that this occurred here, be we must take notice of the "reality" of that possibility in the future. Moreover, the key issue here—whether SSA's hearings are unreasonably delayed—is a live one still for members of the class. The court was fully apprised of the broad nature of the controversy well before White received his hearing before the administrative law judge. If Judge Clarie had been concerned about mootness he obviously could have ruled on the class certification motion more quickly. See *Frost* v. *Weinberger,* supra, 515 F. 2d at 64. But a district court should have enough time to consider these important issues of class status carefully, particularly when no purpose would be served by rushing a ruling. The main reason for requiring that the named plaintiff have a "live" controversy

is to assure adequate representation of the interests of the class. Id. Counsel for the class here has argued energetically and capably throughout, as the outcome below bears out. There is no reason to keep these efforts on behalf of the class in check until the SSA delays so long that it not only provokes a suit but also allows time for a carefully considered ruling on the class issue. Under all the circumstances, we do not think the case is moot.[7]

CLASS CERTIFICATION

Appellant's last preliminary challenge is directed at the certification of the class. First, he argues, White was not a member of the class when it was certified, but as we have just explained, certification can relate back so this case escapes the pitfall of *O'Shea* v. *Littleton,* supra. Also, we are urged, the plaintiffs' claims lack the uniformity of legal and factual issues that is necessary before a case can come within F.R. Civ. P. 23(a)(2). However, plaintiffs all seek social security disability benefits through the identical administrative process, all have requested hearings after initial adverse rulings, and all have endured long delays before hearing. Judge Clarie correctly concluded that these common elements justified class certification.

[7] Judge Clarie's opinion mentions two "named intervenors": Alice Lockwood, who waited over a year between her hearing request and the administrative law judge's final decision, which came in October 1975; and Helen Caldwell, who waited six months for a hearing and ruling on her appeal from denial of disability status after she underwent surgery for lung cancer. From the record, it is unclear whether their motions to intervene were ever actually granted, or when that occurred. We note that if Lockwood's motion to intervene was granted before the hearing and decision by the administrative law judge on White's claim, the action was clearly not mooted before certification of the class in July 1975.

III

We turn now to the merits of the controversy before us. On the record before him, Judge Clarie ruled:

> [T]he lengthy and persistent delays experienced in the Title II disability appeals system in Connecticut averaging 211.8 days between January 1973 and March 1975 * * * are unreasonable. Such delay denies due process rights to aggrieved applicants and conflicts with the statutory purposes and provisions of the Social Security and Administrative Procedure Acts. These acts require that the Agency act with reasonable dispatch.

There seems to be no quarrel with the judge's finding of the average length of delay. Appellant argues instead that the delays did not violate the statutes cited above or the Constitution, that the district court should have deferred to administrative and congressional efforts to remedy the problem of hearing delay and that, in any event, the court should not have granted prospective payments.

Section 205(b) of the Social Security Act, 42 U.S.C. § 405(b), instructs the Secretary to make "decisions as to the rights of any individual applying for a payment" of benefits. Thereafter, upon request of a claimant, the Secretary is directed to provide him with "reasonable notice and an opportunity for a hearing"

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with respect to the decision complained of.[8] We read this as giving the claimant a right to a hearing within a reasonable time and we do not understand the Secretary to dispute this construction. Although what is reasonable depends upon a variety of circumstances, that statutory command should not be ignored. The disability insurance program is designed to alleviate the immediate and often severe hardships that result from a wage-earner's disability. In that context, delays of the better part of a year in merely affording an evidentiary hearing detract seriously from the effectiveness of the program. Perhaps this unfortunate impact might be diminished to a tolerable level if a high percentage of claimants seeking hearings before an administrative law judge were not actually entitled to benefits. But such hearings have led to reversals in more than half the cases heard.[9]

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[8] Section 205(b) reads, in pertinent part: "The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision."

[9] House Comm. on Ways and Means, Committee Staff Report on the Disability Insurance Program (July 1974) at 1. In *Mathews* v. *Eldridge*, 424 U.S. 319, 346, n.29 (1976), the Court focused on the statistical universe of all denials of benefits, not just the ones that are appealed, because that case concerned the overall fairness of the entire procedural system. In our case, the high rate of success for claimants pursuing appeals is meaningful as an indication that a large number of the victims of administrative delay actually are disabled and entitled to benefits.

The Supreme Court noted in *Mathews* v. *Eldridge*, 424 U.S. 319, 342 (1976), that "[i]n view of the torpidity of this administrative review process, * * * and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant." True, the Court ruled that this hardship did not constitutionally compel a hearing prior to termination because, among other things, of the potential sources of temporary income for the claimant and the exigencies of budget and personnel. But the absence of pre-termination hearings makes it all the more important to expedite adjudication of claims of erroneous termination.

As against this, the Secretary points to the serious problems with which the SSA has had to cope. A flood of claims for benefits followed passage of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 901 et seq., and Title XVI of the Social Security Act, 42 U.S.C. § 1381 et seq., which provided supplemental security income (SSI) for the aged. Legislative obstacles prevented efficient deployment of three distinct corps of hearing officers, who were separately handling Title II cases, black lung cases, and SSI cases, to dispose of the backlog involved here. And increasing the hearing staff was difficult because other civil service hearing examiner positions were paid more.

Judge Clarie took note of these problems, and recognized that the SSA had, commendably, tried to overcome them. The SSA has increased support personnel and equipment, hired staff attorneys, and screened cases to identify candidates for favorable action without any need for a hearing. Nevertheless, Judge Clarie found that the SSA was not justified in forc-

ing claimants to endure so many months of delay while they went without benefits. For claimants like White who eventually win reinstatement of benefits after an administrative cut-off, the question truly is, as Judge Clarie found:

> not whether there shall be costs incurred, but who shall bear them while the governmental machinery responsible for providing appeals puts itself in order. When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs.

Cf. NLRB v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263–64 (1969).[10] Like the district judge, we are sympathetic to the administrative problems that beset the SSA, but we do not believe that these difficulties establish that claimants in White's class have been given a "reasonable * * * opportunity for a hearing."

The Secretary also relies on recent legislative history to support his contention that the SSA hearing delays do not violate the Act. We are told that Congress rejected the idea of imposing precise time limits on the SSA, preferring not to sacrifice quality of hearing in the name of speed; and that Congress has recently found that in light of the special problems plaguing the SSA, no unreasonable delay existed. Appellant refers to the special investigation conducted by the House of Representatives Subcommittee on

[10] In that case, a similar concern for the financial plight of statutorily protected workers led the Supreme Court to disallow the reduction of back pay awards because of slow NLRB disposition of the case. The Court had to balance countervailing interests of the innocent wage earner and the party harmed by the delay; here, the claimants are both innocent and hurt by the delay.

Social Security in the fall of 1975. In the wake of that study's full explication of the delay problem and its causes, Congress authorized HEW to employ its hearing examiners more effectively, but imposed no specific time limits for disability hearings.[11] Instead, appellant insists, Congress left the scheduling of the hearing entirely up to the agency's discretion.

We do not believe that this legislative history changes the meaning of § 205(b). Congress did not abandon the requirement of reasonableness, and the decision not to impose precise limits should not be interpreted as an endorsement of the delays. SSA Commissioner James B. Cardwell had represented to Congress that by June 1977 hearing delays would not exceed 90 days.[12] The district court's imposition of a time schedule that allowed the SSA from 90 to 30 days longer than its own projection is hardly at odds with the expectations of Congress.

Appellant also argues that, in any event, the district court acted improperly in ordering the prospective

[11] Pub. L. No. 94–202, 89 Stat. 1135 (1976).

[12] Following his appearance before the subcommittee, Cardwell was asked to respond in writing to a number of specific questions from the subcommittee. Regarding the hearing delays, the question and answer were as follows:

"You stated on page 10 of your prepared statement that you are going to have a goal of a 90-day waiting period for a hearing but then you emphasized the difficulty of the procedures where medical examinations may be necessary and medical and vocational experts used.

"In view of the present backlog and the nature of the hearing process, what is your best estimate of *when* this goal will be met? How many additional ALJ's will be required to meet this goal? Is this goal realistic?

"By June 1976, we expect to be able to process the title XVI cases being heard by SSI hearing examiners within 90 days of receipt of the request for hearing. With respect to the cases which

payments to claimants who endure delays longer than the schedule allows. We are told that Congress authorized prospective payments only in a narrow category of cases which does not include this situation. See 42 U.S.C. § 405(q). But the absence of a specific congressional provision does not bar the federal court's exercise of its remedial power when it finds that the Secretary has violated the statute. In providing for disability benefits, Congress intended to give a disabled worker a ready source of support, financed in part by a tax in the past on his own earnings. The statute was intended to make it unnecessary for an eligible worker to resort to the sometimes demeaning procedure of asking for local relief,[13] as plaintiff

(Continued)

are now being handled by ALJs (e.g., title II, concurrent title XVI and title II, title XVIII, etc.), we hope to be able to reach our goal by June 1977, of issuing the hearing decision within 90 days of the request for hearing. In order to reach this goal we must eliminate the current backlog and to do this we will need to have flexibility in using the current hearing manpower available. Authorization will be needed for all hearing officers to hear cases under titles II, XVI, and XVIII. Once the backlog is eliminated, we will be able to handle anticipated receipts with the budgeted 675 presiding officers.

"The 90-day processing goal is, in our opinion, realistic."

Delays in Social Security Appeals: Hearings before the Subcomm. on Social Security of the House Comm. on Ways and Means, 94th Cong., 1st Sess. 74 (1975).

[13] The Senate Finance Committee minority report, supporting H.R. 7225 (which Congress ultimately passed to create the disability insurance program), said: "Under a sound social-insurance program, Americans should be protected against the fundamental hazards which would otherwise destroy their earning power and reduce them to beggary. Granted that some form of income is necessary to provide for those who are unable to provide for themselves, it is far preferable that these persons should remain proud, self-sufficient Americans rather than become hat-in-hand pleaders for public charity." 1956 U.S. Cong. Code & Admin. News 3942.

White was compelled to do here. Judge Clarie's order is a laudible effort to carry out this Congressional purpose in the difficult circumstances of this case. According to his prescribed schedule, the initial 180-day period did not begin to run until July 1977, which left the SSA more than a year after entry of the order in which to reduce the delays. The order was not given retroactive effect, and it allowed exceptions for cases in which the claimant causes the delay, or where the administrative law judge determines that additional medical evidence must be gathered. Moreover, payments under the order are to cease if the administrative law judge rules against the claimant, in which case the SSA is entitled to full recoupment for interim amounts paid in the meantime. We find no error in this equitable solution to the difficult problem of balancing administrative difficulties and wage earners' needs. *Cf. Nader* v. *FCC*, 520, F. 2d 182, 205–07 (D.C. Cir. 1975); *Deering Milliken, Inc.* v. *Johnston,* 295 F. 2d 856 (4th Cir. 1961); *Phillips* v. *Dawson,* 393 F. Supp. 360 (W.D. Ky. 1975). At the same time, we emphasize that Congress can always assert its power to give the district courts more specific direction. But nothing so far seems to rule out the time limits imposed here.

Appellant also argues that prospective payments cannot issue because 42 U.S.C. § 405(i) allows actual payments only upon a "final decision of the Secretary or upon final judgment of any court * * * that any person is entitled to" the payments. This section is plainly directed at the ordinary situation in which payments become due after favorable administrative adjudication, or judicial review under § 405(g). We do not read § 405(i) as excluding the possibility of interim payments ordered by a court exercising its remedial power.

The judgment of the district court is affirmed.[14]

[14] In view of our holding, we need not decide whether the delays also violated the Administrative Procedure Act or the due process clause.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July, one thousand nine hundred and seventy-seven.

Present: HON. WILFRED FEINBERG, *Circuit Judge*; HON. JOHN A. DANAHER, HON. JOHN F. DOOLING, *District Judges.*

GEORGE WHITE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLEE

v.

DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AS AN INDIVIDUAL AND IN HIS OFFICIAL CAPACITY, DEFENDANT-APPELLANT

77–6015

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

DANIEL FUSARO,
Clerk.

By ARTHUR HELLER,
Deputy Clerk.

APPENDIX C

United States District Court, District of Connecticut
Filed Sept. 9, 12:45 p.m. 1976

[Clerk, U.S. District Court, Hartford, Conn.]

GEORGE WHITE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

vs.

DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AS AN INDIVIDUAL AND IN HIS OFFICIAL CAPACITY

Civil No. H-75-34

Ruling on Cross Motions For Summary Judgment and on Motion to Dismiss

The plaintiff, George White, brought this action on behalf of himself and other Connecticut residents who are attempting to assert claims for Social Security disability benefits under 42 U.S.C. § 423, but whose appeals from adverse agency action have been impeded by extensive delays in the scheduling and completion of hearings before an administrative law judge, as provided for in 42 U.S.C. § 405(b) and 20 C.F.R. § 404.917. Plaintiff's class was certified by this Court on July 18, 1975.[1] Defendant, the Secretary of the De-

[1] The plaintiff class includes both individuals whose initial petitions for disability have been denied by the Social Security Administration (SSA) and individuals who were at one time declared disabled, but whose benefits have subsequently been terminated by the SSA on the basis of a periodic re-examination.

partment of Health, Education, and Welfare (HEW), has moved for dismissal based on lack of subject matter jurisdiction and upon mootness. Plaintiff and defendant have in addition entered cross-motions for summary judgment on the merits.

The affidavits and pleadings reveal that this case is a proper one for treatment by summary judgment, there being no genuine issue as to any material fact separating the parties. Defendant's motion to dismiss is denied, since the Court finds that the case is not moot and the exercise of jurisdiction is not precluded by 42 U.S.C. §§ 405(g) and (h). The plaintiff's motion for summary judgment is granted and the Court finds that the existing delay in processing appeals from adverse agency action is so great as to deprive the plaintiff of his statutory right and his constitutional guarantee of equal protection and due process.

FACTS

There is no dispute as to the central facts in this case, the parties having entered into a stipulation. The named plaintiff,[2] a man in his fifties, applied to the Social Security Administration (SSA) for disability benefits in July of 1972, complaining of a

[2] In addition to plaintiff White, there are two named intervenors in this case. Intervenor Alice Lockwood was denied disability status when she first applied. Lockwood's petition for a hearing before an administrative law judge was filed on October 15, 1974, but she did not receive a final decision until October 27, 1975—376 days later. Intervenor Helen Caldwell was also denied disability status on her initial application after undergoing lung cancer surgery; in her case, there was a delay of approximately six months between petition and decision, although she continued to suffer Meniere's disease, pulmonary emphysema and a depressive reaction. Her condition led a medical consultant to remark in a 1974 report that "[i]t is difficult to see how she was denied—on a strict medical!"

variety of physical disabilities, including laennec's cirrhosis and chronic and acute pancreatitis. At that time he was declared totally disabled and began to receive benefits. As a result of a periodic re-examination begun in September of 1973, however, plaintiff was informed—on December 27, 1973—that he was no longer considered disabled. His benefits were terminated as of January 31, 1974.

He then applied to have his case reconsidered by the SSA, and was informed on July 11, 1974 that his application had been denied. White then petitioned on July 29, 1974 for a hearing before an administrative law judge. No hearing was held on the matter, however, until April 29, 1975, and the final decision was not rendered thereon until May 21, 1975 when the SSA's earlier decision to terminate White's benefits was upheld.[3] In all, 306 days passed between the date of plaintiff's petition for a hearing and the issuance of the final decision.

The plaintiff's experience with the SSA appeals process is not unique. As a result of various factors discussed in more detail below, an extremely large backlog of cases has developed in the SSA's Hearings and Appeals Bureau. In April of 1975, there was a record total backlog of 113,000 pending cases nationwide.[4] The result has been a chronic delay in the disposition of appeals. During the period between January 1973 and March 1975 the average waiting period between an initial request for a hearing and

[3] Since then, the administrative law judge's ruling has itself been reversed by the Appeals Council of the SSA Hearings and Appeals Bureau. White's benefits have thus been reinstated.

[4] Defendant's Memorandum of Jan. 30, 1976, at 13. This figure represents an "all time high" for the Bureau, and has since been reduced. By June, 1976 the backlog had been lowered to 87,860. Aff. of Jan J. Sagett, July 15, 1976, at 2.

the entry of a final decision was 195.2 days nationally, and 211.8 days for petitions in Connecticut [5]—or, approximately six and one-half and seven months respectively. It is of these general lengthy and persistent delays that the plaintiff complains.

(a) *The Social Security Disability System*

To establish disability [6] under Title II of the Social Security Act, a wage earner must provide "such medical and other evidence of the existence [of the disability] as the Secretary may require" in support of the application. 42 U.S.C. § 423(d)(5). This evidence must establish disability by means of "medically acceptable clinical and diagnostic techniques." *Id.* § 423(d)(3). And it must be shown that the disability in question is sufficiently great that:

> [the wage earner] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. *Id.* § 423(d)(A).

To qualify for disability benefits, then, the worker's disability must be total, such that no "substantial gainful work" opportunity exists. The level of benefit payments is based on a variety of factors, including

[5] Plaintiff's Memorandum of Dec. 3, 1975, at 5.

[6] The term "disability" is defined in 42 U.S.C. § 423(d)(1)(A) as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months * * *."

age and the prior average monthly earnings of the worker while employed. Eligibility under Title II of the Social Security Act is not based directly on financial need.

If it is determined that an individual is not disabled, either on an initial application or as the result of a periodic re-examination, a "redetermination hearing" may be sought with the SSA to review the case.[7] This review is undertaken on the basis of forms and affidavits submitted to the Agency by the applicant; no face to face meeting takes place at this time.[8]

Should the result of the redetermination hearing be adverse to the applicant, he may then petition for a hearing before an administrative law judge.[9] At this stage a full evidentiary hearing is held with the applicant in attendance. If the result is again unfavorable, a final discretionary review may be sought before the Appeals Council of the SSA Hearings and

[7] Although an applicant for disability benefits initially files with the SSA, the actual determination of disability is made by an authorized state agency. Likewise, periodic reexaminations are undertaken by the state, and thus it is not until the redetermination hearing stage that the SSA becomes integrally involved in the merits of a given case.

[8] It is true, as defendant contends, that the SSA redetermination hearing is not undertaken in a vacuum, inasmuch as the Agency has before it affidavits based on personal examination of the applicant undertaken by his own doctor and sometimes by doctors assigned by the Agency. Nevertheless, as the reversal rates cited below indicate, there is a basis to stress the importance of a face to face hearing.

[9] *See* 20 C.F.R. §§ 404.917.

Appeals Bureau.[10] It was this latter Council that finally overturned the original determination made with respect to plaintiff White in this case.

To judge from the number of reversals at the administrative law judge stage of appellate review the "error rate" in SSA disability determinations is substantial. The incidence of reversals by administrative law judges exceeds 50 percent of all the cases heard.[11] The reversal rate is much lower, to be sure, when measured against the total number of original denials, many of which are not appealed.[12] However with respect to those individuals who feel sufficiently aggrieved with the Agency's decision to seek an appeal (the relevant class in this case), the prospects for a reversal are substantial. It cannot be persuasively maintained that a pattern of extended delay in the completion of hearings before an administrative law judge is but a matter of small consequence to such aggrieved applicants.

[10] As stressed by the Court in *Mathews* v. *Eldridge*, *supra*, no decision issued by the SSA is ever totally "final" in the sense that the applicant's file is retained in order that new evidence may be submitted, should any become available. Moreover, within 60 days after a "final decision" of the Secretary the applicant may obtain a review of the decision in district court, 42 U.S.C. § 405(g).

[11] *Committee on Ways and Means, Staff Report on the Disability Insurance Program 1* (*July*, 1974).

[12] Defendant's Memorandum of Jan. 30, 1976, at 27. If measured against all initial denials of disability, the relevant error rate is approximately 13.5%. If only appeals before the Hearings and Appeals Bureau administrative law judges are considered, the reversal rate becomes a much larger 51.6%.

(*b*) *Causes of the Backlog and Remedial Steps Taken*

A number of factors have contributed to the existing backlog of appeals cases before administrative law judges. In the first place, the government represents that a large volume of "black lung" cases have been filed under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 901 *et seq.* While special judges have been appointed to hear these cases, appeals have appeared in such volume that the Hearings and Appeals Bureau has been required to shift some Title II (disability) judges to cover them.[13] Similarly, the enactment of Title XVI of the Social Security Act, Supplemental Security Income for the Aged, Blind and Disabled (SSI), has resulted in extra work for Title II judges.[14]

In addition to such external burdens a variety of internal difficulties have plagued the Bureau. Officials complain of inflexibility in the use of Title XVI hearings officers,[15] of difficulties in recruiting a sufficient number of administrative law judges, and of a growing number of disability appeals.

Steps have been taken both by the SSA and by Congress to reverse the flow of this tide. The Agency has, for instance, substantially increased its support staff, added to the number of administrative judges and hearings officers, and instituted various improved techniques to expedite case processing.[16] Productivity has risen substantially as a result of these and other in-

[13] Defendant's Memorandum of Jan. 30, 1976, at 11–12 (citing affidavit of Daniel Schultz, Director of Bureau of Hearing and Appeals). The initial number of hearing requests under the Black Lung program was 75,000.

[14] Id. at 12–13.

[15] Aff. of Daniel L. Schultz, Jan. 15, 1976, at 5.

[16] Defendant's Memorandum of Jan. 30, 1976, at 15.

novations,[17] although officials point to a deluge of incoming cases which have overwhelmed the improvements in recent months.[18]

Congressional hearings were held in 1975 to probe the backlog problem, and a piece of remedial legislation, P.L. 94–202, was thereafter passed by Congress and signed in law in January of 1976.[19] This bill provides the Secretary of HEW with temporary authority to permit the use of SSI hearing examiners to review Title II appeals. It may be noted that during the time P.L. 94–202 was before Congress additional legislation was introduced which would have set an express time limitation on the scheduling and completion of appeals hearings.[20] In H.R. 5276, introduced by Rep. Seiberling, a 120-day maximum limit would have been imposed.[21] No such time restriction was included in the final legislation, however.

It was originally the aim of the SSA Hearings and Appeals Bureau to reduce the median delay in obtaining a hearing before an administrative law judge to 90 days by July, 1977.[22] Recently the Bureau has abandoned this estimate because of shortfalls in administrative law judge recruitment.[23] Nevertheless

[17] When measured from the lowest productivity period (the fourth quarter of FY 1974) through the end of the first quarter of FY 1976, there has been a national level productivity increase of 62%. Aff. of Daniel L. Schultz, Jan. 15, 1976, at 8. There has likewise been a marked productivity increase in the Connecticut area. *Id.*

[18] *See* Aff. of Jan J. Sagett, July 15, 1976.

[19] Defendant's Memorandum of Jan. 30, 1976, at 16.

[20] *Id.* at 16–17.

[21] *Id.*

[22] Statement of Atty. Thomas Stout for defendant to the Court, Feb. 17, 1976.

[23] Aff. of Jan. J. Sagett, July 15, 1976, at 2.

it has been shown that productivity gains are possible to achieve, and defendant anticipates the special assignment of two corps of temporary administrative law judges in Region I (which includes Connecticut) to combat the large backlog in this geographical region. It is estimated that through the use of these judges the Region I backlog can be reduced by 40 percent.[24]

The primary issue to be decided on these facts is whether or not the administrative hearing delays experienced in the SSA appeals system deprive the plaintiff of statutory or constitutional rights or privileges, thereby justifying action by this Court. For reasons stated below, we conclude that they do.

JURISDICTION AND MOOTNESS

Before reaching the merits, the defendant's motion for dismissal based on mootness and lack of jurisdiction must be addressed. The defendant has taken the position from the outset that subject matter jurisdiction was lacking in this Court by virtue of the restrictions set up within the Social Security Act, 42 U.S.C. §§ 405 (g) and (h).[25] The plaintiff has responded that the statutory limitation imposed in these sections extends only to suits "brought to recover on

[24] *Id.* at 2–3.

[25] 42 U.S.C. § 405(h) reads, in its relevant part: "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter." In *Weinberger* v. *Salfi*, 422 U.S. 749, 756–67 (1975) (Rehnquist, J.), the Court presented quite a restrictive interpretation of § 405(h) in a case where plaintiff sought § 1331 jurisdiction to attack specified Social Security Act provisions as unconstitutional. *Salfi* involved a substantive attack upon the statute, however, and in this regard is distinguishable from the present case.

[a] claim arising under [the Social Security]," [26] whereas the thrust of plaintiff's present action, they argue, is to expedite disability hearings and not to procure an advance judicial pronouncement on the merits of a particular case.

While the present motions were pending the Supreme Court decided *Mathews* v. *Eldridge,* No. 74–204, —— U.S. ——, 44 U.S.L.W. 4224 (Feb. 24, 1976). In that case, the plaintiff argued, pursuant to *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) and related cases, that fifth amendment due process necessitates an evidentiary hearing prior to the termination of disability benefits by the Secretary. The government argued that the Court's interpretation of § 405(h) in *Weinberger* v. *Salfi,* 422 U.S. 749 (1975), precluded federal court action, since no "final decision" had been taken by the Agency.[27] The *Eldridge* Court held, however, that a "sufficiently 'final decision'" had in fact occurred, since Eldridge protested the termination of his benefits and the SSA had rejected the protest.[28] Thus, jurisdiction was found under the Social Security Act itself, 42 U.S.C. § 405(g).

Plaintiff in the present action does not allege jurisdiction under § 405(g). The holding in *Eldridge* therefore does not redound directly to his benefit. Neither does it stand as an impassible barrier to the maintenance of his action, as defendant strongly contends. Indeed, the principal jurisdictional questions in this case were expressly reserved by the *Eldridge* Court, when it said:

> Given our conclusion that jurisdiction in the District Court was proper under § 405(g), we find it unnecessary to consider Eldridge's contention that notwithstanding § 405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. § 1361, or the Administrative Procedures Act. 5 U.S.C. § 701 *et seq.* Slip Op. at 10 n. 2.

[26] 42 U.S.C. § 405(h) (last sentence).

[27] *See Mathews* v. *Eldridge, supra,* Slip Op. at 5.

[28] *Id.* at 4–10.

What is more, in applying statutory prohibitions on judicial review of agency decisions, the *Eldridge* Court stressed the need to weigh the specific prayers and allegations in a plaintiff's action against the language and purpose of the prohibition, placing special emphasis on the need to preserve constitutional claims.[29] The Court in *Eldridge* itself adopted this relational approach, framing the jurisdictional issue as "whether the denial of Eldridge's claim to continued benefits was a sufficiently 'final decision' *with respect to his constitutional claim* to satisfy the statutory exhaustion requirements." [30] It was significant to the Court in analyzing the question that "Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement." [31]

Here again the question is not whether there has been a "final decision," but whether statutory and constitutional violations have occurred as the result

[29] In a footnote, the Court stated: "Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has ben satisfied. The role these factors may play is illustrated by the intensely 'practical' approach which the Court has adopted * * * when applying the finality requirements of 28 U.S.C. § 1291 * * * and 28 U.S.C. § 1257. * * * [*T*]*he core principle that statutorily created finality requirements should, if possible, be construed so not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.*" Slip Op. at 9 n. 11 (emphasis added).

[30] *Id.* at 8 (emphasis added).

[31] *Id.*

of a *delay* in final action. Thus plaintiff seeks to avoid § 405(g) rather than to fall under it, arguing that his is not a suit to "recover on any claim arising under" the Social Security Act, but only to have the system operate with reasonable speed. *Eldridge* offers at least tacit support for this approach, and certainly presents no prohibitive impediment to it. We hold, therefore, on an analysis of *Eldridge* and of the language in 42 U.S.C. § 405(h), that the latter statute does not bar the Court's assuming jurisdiction of this case exclusive of the limitations provided under § 405(g).[32]

It remains to be determined, whether or not sufficient grounds exist for the Court to take up jurisdiction under other statutes, in particular 28 U.S.C. § 1361 (mandamus and 5 U.S.C. §§ 701, 704 and 706 (Administrative Procedure Act). Since plaintiff's case is strongest for mandamus jurisdiction, and since that would be a sufficient basis for purposes of this litigation, we analyze it first.

Several courts have recently upheld mandamus jurisdiction on facts similar to those of the present case. *Blakenship* v. *Mathews,* No. C 75-0185 L(A) (W.D. Ky. May 6, 1976); *Sturgill* v. *Mathews,* No. 75-288 (E.D. Ky. Sept. 17, 1975); *Barnett* v. *Weinberger,* No. 74-270 (D.Vt. May 6, 1975); *cf. Tatum* v. *Weinberger,* No. C 74-351 L(A) (W.D. Ky. Jan. 16, 1976); Nos. 75-1695 and 75-1696 (6th Cir. Sept. 2, 1976). The thrust of these decisions is similar. Mandamus jurisdiction requires that three basic conditions be met: "(1) a clear right in the plaintiff to the relief

[32] *Accord, Sturgill* v. *Mathews,* Civ. No. 75-288 (E.D. Ky. Sept. 17, 1975). *Cf. So. Windsor Convalescent Home* v. *Mathews,* No. 75-6136 (2d Cir. July 27, 1976), Slip Op. at 5124; *Lejeune* v. *Mathews,* 526 F. 2d 950, 953 (5th Cir. 1976); *Sanders* v. *Weinberger,* 522 F. 2d 1167, 1171 (7th Cir. 1975).

sought; (2) a plainly denied and preemptory duty on the part of the defendant to do the act in question; and (3) no other adequate remedy available." *Lovallo* v. *Froehlke,* 468 F. 2d 340, 343 (2d Cir. 1972), *cert. denied,* 411 U.S. 918 (1973). Here, as in the cases cited,[33] these conditions are met.

In the first place plaintiff has a clear right to the hearing he seeks, 42 U.S.C. § 405(b); 20 C.F.R. § 404.91. Secondly, there is a duty upon the Secretary to perform within a reasonable time and not permit unreasonable delay of administrative action. 5 U.S.C. § 555 (b).[34] This sort of duty has been held to be mandatory. *Deering Milliken* v. *Johnston,* 295 F. 2d 856, 860-61 (4th Cir. 1961); *see also, Barnett* v. *Weinberger, supra.* And thirdly, it is the crux of plaintiff's suit that he cannot receive a prompt hearing, a fact,

[33] The above cited cases are not directly in point, since different Social Security programs or practices were challenging therein. Nevertheless, *Blakenship, Sturgill* and *Barnett* involved substantially the same issue as we find here, and the jurisdictional analyses presented in those cases are clearly germane.

[34] "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. *With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.* This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding." 5 U.S.C. § 555(b) (emphasis added).

which on its face, the Secretary does not (and indeed could not successfully) dispute. Thus by definition, there is virtually no other adequate remedy available.[35] Nor can it be argued that since the Secretary's duties are to some measure discretionary, mandamus is precluded. When the actions or inactions of an official greatly exceed the discretion vested in the office, mandamus may be appropriate. *Nixon v. Secretary of the Navy*, 422 F. 2d 934, 939 (2d Cir. 1970); *United States ex rel. Schonbrun v. Commanding Officer*, 403 F. 2d 371, 374 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969).

The Court concludes that jurisdiction is proper under 28 U.S.C. § 1361. Having reached this conclusion, it is unnecessary to consider alternative bases of jurisdiction.[36]

Defendant also has urged the Court to set aside this case as moot, since White, the named plaintiff, has now received a hearing and a favorable decision from the SSA Appeal Council. The Court does not believe that White's ultimate satisfaction in this matter requires that it dismiss the action. The Supreme Court in *Sonsa* v. *Iowa*, —— U.S. ——, 42 U.S.L.W. 4125 (Jan. 14, 1975), a case on which defendant relies heavily looked to the date of class certificatio nas a key point in time with respect to mootness determination.

[35] Conceivably the Secretary could act on the basis of a complaint addressed to him by an individual aggrieved applicant. But the Secretary is already fully aware of the existing appeals backlog, and it must be concluded that no adequate remedy is available.

[36] The Court expresses no opinion as to whether independent jurisdiction might be available under the Administrative Procedures Act. While it was not relied upon by the plaintiff, on the other hand, it would not seem frivolous to this Court for plaintiff to seek jurisdiction under § 405(g), in light of language in the *Eldridge* opinion. *See* note 29 *supra*.

Id. at 4127. This might admittedly create some problem for plaintiff, since although White's reversal came in December of 1975—well after the certification of the class in July, 1975—White's hearing before an administrative law judge was held on May 21, 1975, which was well before the certification date. Nevertheless, the Court in *Sonsa* expressly recognized that in an appropriate case (*e.g.*, where the case becomes moot with respect to named plaintiffs "before the District Court can reasonably be expected to rule on a certification motion") certification may "relate back" to the date of the filing of the complaint. *Id.* at 4128 n. 11. Here, plaintiff's motion for class certification was filed on March 17, 1975, and a hearing on the motion was held before this Court on May 19, both of which dates precede the earliest point at which the case might have arguably become moot. Under the *Sonsa* holding, then, in light of the fact that "a live controversy" persists to this date and has so persisted throughout the proceedings,[37] the Court sees no valid reason upon which to declare this case moot.

SUBSTANTIVE CLAIMS

In a supplemental brief,[38] the defendant urged strongly that the plaintiff's constitutional claims were rendered untenable by the decision in *Eldridge* v. *Mathews, supra*. In light of defendant's heavy re-

[37] "There must not only be a named plaintiff who has such a case or controversy at the time the the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23,[11] but there must be a live controversy at the time this Court reviews the case * * *." 43 U.S.L.W. at 4128.

[38] Defendant's Memorandum of April 9, 1976.

liance on that case, the Court feels obliged to address the matter briefly.

As stated above, *Eldridge* involved the claim by a terminated disability recipient that the absence of an evidentiary hearing before termination deprived him of due process, as the termination of welfare benefits without a prior hearing was found to violate due process in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). Recognizing the validity of *Goldberg,* but refusing to extend its holding to the facts in *Eldridge,* the Court restated the calculus which must be applied, on a case by case basis, when assessing the procedural due process clause:

> * * * identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedure would entail. Slip Op. at 12–13.

In denying Eldridge the same pre-termination hearing afforded in *Goldberg,* the Court distinguished between the necessity for a face to face hearing in either situation,[39] and also between the degree of deprivation likely to be suffered by welfare recipients upon termination of their benefits as compared with Social Security disability recipients.[40] It was concluded that, *with respect to plaintiff's particular claim,* a difference of constitutional significance existed between welfare recipients and Social Security disability beneficiaries.

[39] The Court stressed that whereas truthfulness is a frequently material issue in welfare hearings, determinations of disability normally proceed through inspection of medical data which is comparatively objective, *Mathews* v. *Eldridge, supra,* Slip Op. at 21–23.

The Court in *Eldridge* did not rule, however, that termination of a disability recipient's benefits is altogether without constitutional significance; indeed, the very opposite was held.[41] The Court merely determined that the disability recipient's deprivation was not sufficient to compel an elaborate and expensive addition onto the existing system for determining disability.[42] So far as this Court can determine, nothing in *Eldridge* precludes a finding in plaintiff's favor on the constitutional claims put forth in this case.

Proceeding to the merits, the Court finds this case differs substantially from the case in *Eldridge.* The nature of the personal interest alleged violated is dif-

[40] *Id.* at 17–21. The Court drew only a limited distinction between welfare and Social Security disability recipients with respect to need, sufficient to decide the case in *Eldridge:* "In view of the torpidity of this administrative review process * * * and the typically modest resources of the family unit of the physically disabled worker, the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient." Slip Op. at 20 (footnotes omitted).

[41] *Id.* at 10.

[42] Plaintiff in *Eldridge* sought to affix a full evidentiary hearing at the outset of the disability termination process. Under the circumstances the Court felt that this particular relief was unwarranted: "The judicial model of an evidentiary hearing is neither required, nor even the most effective, method of decision making in all circumstances." Slip Op. at 26. Thus, the Court upheld the constitutionality of the disability appeals structure in its broad outline.

ferent to begin with. While Eldridge complained of the SSA's decision to terminate his benefits without a hearing, here the plaintiff seeks to have the appeals process proceed in a more prompt fashion.[43] Furthermore, there is a difference in the relevant likelihood of error. Eldridge never filed for a hearing before an administrative law judge, and thus the relevant error rate to consider in his case, as pointed out by the Court,[44] was the incidence of reversals with respect to *all* disability denials. The class in this case, by comparison, consists only of individuals who have taken an appeal. With respect to this class the relevant error rate is far higher than was the case in *Eldridge*,[45] and indeed exceeds 50 percent. Third, there can be far less objection to the remedy sought here from a public interest standpoint than was true in *Eldridge*. It has been demonstrated that improvements are possible through which the backlog of SSA appeals cases may be reduced. There is undeniably a cost associated with such improvements, and the Court is mindful that setbacks may occur despite ardent efforts to avoid them. Nevertheless, the question is not whether there shall be costs incurred, but who shall bear them while the governmental machinery responsible for providing appeals puts itself in order.

[43] In *Fusari* v. *Steinberg*, 419 U.S. 379, 389 (1975), the Court stated that: "the possible length of wrongful deprivation of * * * benefits [also] is an important factor in assessing the impact of official action on private interests."

[44] *Mathews* v. *Eldridge*, *supra*, Slip Op. at 24–25 and n. 29.

[45] The Court said in *Eldridge* that: "[b]are statistics rarely provide a satisfactory measure of the fairness of a decision making process." Slip Op. at 24. In the context of *Eldridge*, which involved a qualitative comparison between hearings and administrative determination, this comment had obvious relevance. Here, reversal statistics are probative of a narrower question—*i.e.*, whether the delay experienced by plaintiff is associated with a material deprivation, in light of the reversal rate—and thus the use of statistics in this instance is not subject to the same objections as in *Eldridge*.

When the government does not act with reasonable promptness, those claiming total disability are required to bear an unreasonable delay and suffer unwarranted deprivation of that which is lawfully theirs. The Court finds that the lengthy and persistent delays experienced in the Title II disability appeals system in Connecticut averaging 211.8 days between January 1973 and March 1975 (moreover, the intervenor Alice Lockwood was required to wait 376 days for a decision) are unreasonable.[46] Such delay denies due process rights to aggrieved applicants and conflicts with the statutory purposes and provisions of the Social Security and Administrative Procedure Acts. These acts require that the Agency act with reasonable dispatch.

Accordingly within the District of Connecticut the defendant shall, on or before July 1, 1977, have reduced the maximum delay between the filing of a petition for a hearing before an administrative law judge and the issuance of a final decision to one hundred and eighty (180) days; and furthermore, by the

[46] While the period between the filing of a petition for a hearing before an administrative law judge and the issuance of a final decision has been the focus of this analysis, it should not be overlooked that the period of time which ensues between the *termination of benefits* and their reinstatement in the event of a favorable appeals result is even longer. In the case of plaintiff White, there was a six month interim betwen the termination of his benefits and the filing of a petition for appeal after final agency action. This period was not included when computing the original 306 day delay, and thus the latter figure—large as it is—does not fully convey the deprivation which occurred.

final day of December, 1977, the Secretary shall have reduced the maximum delay to one hundred and fifty (150) days; and finally, by July 1, 1978, the maximum delay shall be one hundred and twenty (120) days. Failing this, any applicant who, on any of these days, has an application for a hearing which has been pending longer than the allotted time, shall be entitled to receive benefits as though favorable action had been taken in his or her case, subject to termination upon a subsequent unfavorable hearing result. Excludable from the foregoing time limitation shall be such periods of delay as are caused directly by a petitioner's own failure to provide essential information for adjudication. The parties will submit within fifteen (15) days a suitable proposed order to accomplish the purposes of this judgment.

SO ORDERED.

Dated at Hartford, Connecticut, this 29th day of September, 1976.

T. EMMET CLARIE,
Chief Judge.

APPENDIX D

United States District Court, District of Connecticut

Filed, Oct. 29, 3:00 p.m. 1976

[Clerk U.S. District Court Hartford, Conn.]

GEORGE WHITE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

vs.

DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AS AN INDIVIDUAL AND IN HIS OFFICIAL CAPACITY

Civil No. H-75-34

Judgment

IT IS HEREBY ORDERED that judgment be entered as follows:

IT IS HEREBY ADJUDGED that defendant's failure to provide a prompt administrative hearing and decision for those Title II disability insurance benefit claimants residing in the District of Connecticut who request an appeals hearing before an administrative law judge denies plaintiff's and his class' constitutional right to due process of law and conflicts with the provisions of the Social Security Act, 42 U.S.C. § 405 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 555(b) *et seq.*

IT IS FURTHER ORDERED AND ADJUDGED THAT:

(1) The defendant is enjoined, ordered, and directed to conduct administrative law judge hearings requested pursuant to § 205(b) of the Social Security Act, 42 U.S.C. § 405(b), residents of the District of Connecticut claiming Title II disability insurance benefits and to issue a written decision thereon within the following time periods:

(a) For any request filed before December 31, 1977, within a maximum time of one hundred eighty (180) days.

(b) For any request filed on or after December 31, 1977, but before July 1, 1978, within a maximum time period of one hundred fifty (150) days.

(c) For any request filed on or after July 1, 1978, within a maximum time period of one hundred twenty (120) days.

For purposes of computing these time periods, the aforementioned periods shall commence with the date of receipt by defendant of a formal written request for hearing filed pursuant to 20 C.F.R. § 404.918 and shall end with the earlier of the date of mailing of the written decision of the administrative law judge or the end of the 180th, 150th or 120th day, as applicable, following defendant's receipt of the written hearing request. In the event that the last day of the periods enumerated in subparagraphs (a) through (c) falls upon a Saturday, Sunday, or legal holiday (as defined by Fed. R. Civ. P. Rule 6 (a)) the enumerated periods shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday. The remaining

exceptions of the time periods are set out in paragraph (4), *infra*.

(2) Defendant David Mathews is ordered to grant prospective payments to those claimants who fail to receive their final decision within the maximum delays expressed in paragraph (1). In these instances, the entitlement shall be the first month after the month in which the maximum time period is exceeded and the last month of the entitlement shall be the month in which a written decision by the administrative law judge is issued. Nothing in this order shall be construed to require the payment of retroactive Title II disability insurance benefits based upon the alleged date of disability onset. Nothing in this order shall be construed to limit defendant's right to recover payments made under this paragraph if it is finally determined that the individual so paid is not under a disability for any period in which payments are made pursuant to this paragraph.

(3) The defendant after scheduling and rendering a decision, in accordance with paragraph (1), *infra*, shall certify payment to the petitioner with all reasonable dispatch.

(4) Exception from the maximum time periods sets out in paragraph (1) occurs in those cases in which the claimant

(a) Directly causes a delay by his or her own failure to provide essential information for adjudication;

(b) Requests a delay;

(c) Fails to appear for scheduled hearing; or

(d) The administrative law judge as a result of evidence adduced at the hearing or in the course of his post-hearing review in good faith determines that a consultative medical examina-

tion or additional medical evidence in the possession of third parties is required. Provided, however, that the exception from the maximum time limit shall be limited to the time required to produce the evidence. Such additional material shall be obtained with all due diligence.

(5) Within sixty (60) days from the date of this decree, defendant David Mathews shall submit to the Court and to the plaintiff's attorneys a detailed statement or plan for implementing the relief required by paragraphs (1) and (2) on a continued basis, and the actual administrative steps taken to effectuate said plan. Any disputes between the parties as to whether the procedure and steps outlined by the defendant will fulfill the requirements of this decree shall be resolved by the Court.

(6) Within sixty (60) days from the date of this decree, defendant David Mathews shall submit to the Court and to the plaintiff's attorneys a detailed statement or chart indicating the number of claimants awaiting hearings or decisions which have not received final administrative action. Furthermore, for each individual claimant so situated, the chart will state the original date of the petition, the date of a hearing, or the final decision.

(7) Beginning with the petitions received on the 61st day after the entry of this decree and continuing thereafter, defendant David Mathews is directed to notify each petitioner for an administrative law judge hearing of his rights under the decree by including a brief statement of the rights received by this decree. Said notice shall be included by attachment to the defendant's acknowledgement of the claimant's request for an administrative law judge hearing. The plaintiff and defendant will provide the

Court with an agreed upon statement of notice to the claimant.

(8) This decree shall be binding upon the Secretary of Health, Education, and Welfare when adjudicating hearings within the State of Connecticut.

(9) This Court shall retain continuing jurisdiction over this cause for all purposes.

SO ORDERED.

Dated at Hartford, Connecticut, this 28th day of October, 1976.

T. EMMET CLARIE,
Chief Judge.

APPENDIX E

In the United States District Court for the District of Connecticut

GEORGE WHITE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF

v.

DAVID MATHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AS AN INDIVIDUAL AND IN HIS CAPACITY AS SECRETARY, DEFENDANT

Civil Action No. H75/34

Affidavit of Daniel L. Schultz

COUNTY OF ARLINGTON,
State of Virginia, ss:

I, Daniel L. Schultz, being duly sworn, say:

(1) I am the duly directed Acting Director of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education, and Welfare.

(2) The following paragraphs detail the major steps that are required or commonly involved in the processing of the "typical" Title II disability insurance claim at the hearing stage.

(a) Upon receipt of a request for hearing, which may be filed in any office of the Social Security Administration, clerical controls are established, and the case is assigned to an administrative law judge servic-

ing the claimant's geographical area. The existing claim folder, which contains the claimant's collected records, is normally maintained at this point by the Bureau of Disability Insurance in Baltimore, Maryland, and is simultaneously secured and mailed to the designated hearing office.

(b) Upon receipt of the claim folder, the administrative law judge's initial substantive task is a review of the record to determine the necessity for and extent of prehearing development of evidence which may be required for a decision. While Section 404.1523 of the Social Security Administration Regulations No. 4, 20 C.F.R. 404.1523 places the burden of presenting evidence of disability with the claimant, Section 404.927 of Regulations No. 4, 20 C.F.R. 404.927, provides that the administrative law judge "shall inquire fully into the matters at issue * * *." This latter section requires that the administrative law judge assure there is adequate development of all relevant and material evidence that is reasonably available.

Additional development may be required if the available medical evidence is lacking in precision and detail, conflicting, inconclusive, or otherwise deficient. Since a claim is ordinarily disallowed at the initial and reconsideration levels due to the claimant's failure to meet one specific requirement of the statute or the regulations, the adjudicating offices may not have resolved all other factors which may become relevant. An administrative law judge must be prepared to cover all matters relevant to an individual's claim to entitlement in a *de novo* hearing, and he may, therefore, be required to document heretofore unexplored issues. For example, when a claim for disability benefits was previously denied due to the claimant's failure to meet the special earnings requirements for insured status,

the administrative law judge may need to initiate substantial development of medical issues. If the prior denial was based on medical considerations, the administrative law judge may be required to decide questions concerning the claimant's record of earnings or, as it may be relevant to a claim for disability benefits, his age.

Development of medical evidence can be a complex, multistage process involving contacts with a wide variety of medical sources. It is frequently necessary for the administrative law judge to request either directly or indirectly through a local Social Security office or a designated State Agency, existing evidence from private treating physicians, hospitals, and/or other institutions and agencies. If the required evidence is not forthcoming, the administrative law judge may need to issue subpoenas, as he is empowered to do by Section 404.926 of Regulations No. 4, 20 C.F.R. 404.926. If the administrative law judge concludes that the existing evidence is deficient in quality, extent, or conclusiveness, he may find that it is necessary to request that the cooperating State Agency arrange and schedule one or more special consultative examinations. Sequential examinations may even be necessary. A social worker and a psychologist may, for example, be asked to provide preliminary reports to an examining psychiatrist. As documents and reports are received, they can raise new medical issues, which, in turn, must be explored. Further development can also be required to consider ongoing changes in a claimant's medical condition.

Nonmedical issues such as age and earnings can also involve complex stages and procedures. For example, resolution of questions concerning a claimant's record of earnings may require multiple contacts with

employers, exploration of employee-employer relationships and/or review and analysis of business records and tax returns.

(c) In his prehearing consideration of the case, the administrative law judge may conclude that testimony by a vocational expert and/or medical advisor will be essential or desirable to full consideration of the issues. In such instances, the administrative law judge takes the steps necessary to provide the expert with copies of the evidence for prehearing review and study.

(d) In addition, the claimant's right to see the record permeates every step of the decisional process within the Bureau of Hearings and Appeals. Therefore, the administrative law judge may need to provide the claimant or his representative with an opportunity to examine the evidence prior to the hearing.

(e) Upon completion of this prehearing consideration and development of the case, the administrative law judge must fix a time and place for the hearing. While the general rule observed is to schedule hearings according to dates of requests, other factors are also given consideration. For example, if an administrative law judge plans a trip to a particular town, he is expected, for reasons of efficiency, economy, and claimant service, so schedule, to the extent possible, all cases pending in that area, regardless of the dates of requests. It may also be necessary to schedule a hearing out of sequence to account for special circumstances, such as the temporary availability of witnesses, particularly expert witnesses such as physicians or vocational experts, or grave hardship.

(f) Section 404.923 of Regulations No. 4, 20 C.F.R. 404.923, requires the administrative law judge, absent

waiver by a party, to mail the parties written notice of hearing not less than ten (10) days prior to the time set for the hearing. If it becomes necessary to change the date or place of the hearing, the administrative law judge must also provide the parties reasonable notice of such change (Section 404.923 of Regulations No. 4).

(g) At the hearing, the claimant is afforded an opportunity to examine the record, to object to proposed exhibits, to submit additional documentary evidence, to testify, to call witnesses, and to state oral arguments as to the facts and law.

(h) Exploration of the issues at the hearing can demonstrate conflicts or inadequacies in the available documentary evidence. In such cases, the administrative law judge's responsibility to inquire fully may require him to seek additional evidence through any or all of the developmental techniques described in item (b) above. Situations also arise in which the administrative law judge must adjourn a hearing or schedule a supplemental hearing for the purpose of receiving additional testimony, such as that of a vocational expert, the need for which was not apparent during prehearing consideration of the case.

(i) Unless the claimant waives his right to see evidence secured after a hearing, he or his representative must be afforded a reasonable opportunity to examin and comment on such evidence.

(j) The administrative law judge is also required, in accordance with provisions of Section 404.930 of Regulations No. 4, 20 C.F.R. 404.930, to provide the parties a reasonable posthearing period to file briefs as to facts or law.

(k) As soon as practicable after completion of the record, the administrative law judge writes and issues his decision.

(3) Currently, the Bureau of Hearings and Appeals is facing a nationwide problem of backlogs in requests for hearings which extends to residents of Connecticut. The roots of this backlog problem are essentially three-fold—(1) a very large one-time volume of claims for Black Lung benefits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 901 et seq., and the introduction of Title XVI of the Social Security Act, Supplemental Security Income for the Aged, Blind, and Disabled, 42 U.S.C. 1381 et seq., at a time when the program administered under Titles II and XVIII of the Social Security Act, Old Age, Survivors, Disability and Health Insurance was experiencing rapid growth; (2) a lack of flexibility in the use of three distinct corps of legislatively created hearing officers (Title II and XVIII Administrative Law Judges, Black Lung Administrative Law Judges, and SSI Hearing Examiners); and (3) difficulties encountered in appointing additional administrative law judges.

After the inception of the Black Lung program, the Bureau of Hearings and Appeals received approximately 75,000 requests for hearings under this program. Since the Social Security Administration's and this Bureau's jurisdiction over this program was under the legislation temporary ending with claims filed on December 31, 1971 (later extended by P.L. 92–603, § 5(1) to June 30, 1973), the Bureau was faced with a massive, one-time workload. It was virtually impossible to appoint administrative law judges to handle this one-time hearing workload, for a reduction in force which would terminate the appointments

axiomatically would follow. In December, 1971, over 2 years after enactment of the Black Lung Program, we received the necessary Congressional authority to appoint a special administrative law judge corps for this program. As an interim measure, the Bureau was required to use our existing Title II administrative law judges to hold a substantial number of Black Lung hearings. This resulted in a further buildup of our pending Title II hearing workload which had independently increased from 42,573 hearing requests in FY 1970 to 76,281 in FY 1974.

In the midst of this problem, Title XVI of the Social Security Act, the Supplementary Security Income program, became effective as of January 1, 1974. The enabling legislation authorized is to appoint hearing examiners under this title. The appointment process which was patterned upon the Civil Service Commission's procedures for the selection of Title II administrative law judges to protect against allegations that the Bureau had selected less than independent, qualified hearing examiners required an extended period of time and required us, as an interim measure, to use Title II administrative law judges for the SSI hearings. In addition, a continuing problem developed with respect to the SSI workload, since many of the SSI claims were coupled with Title II social security claims. In this situation, the Bureau was required to utilize a Title II administrative law judge to hear the case. This lack of flexibility and delays in appointments resulted in a buildup of an abnormally high national hearing backlog which reached an all time high of 113,000 in April, 1975.

(4) After preliminary study, the Social Security Administration has made a concerted effort to reduce the hearings backlog and initiatives have been under-

taken since January, 1975 to reduce this backlog and processing times. First a case processing goal was established in an effort to identify more precisely the scope of the remedy required—i.e., to stabilize the workload by the end of FY 1976.

One of the first measures taken to implement this goal was to identify areas where cases could be processed more quickly by the addition of support personnel and/or more sophisticated equipment. From January 1975 through mid-September, 1975, an additional 258 support personnel were authorized for hearings officers who had demonstrated that they could dispose of more cases with such assistance. In addition, the Bureau upgraded the quality of office equipment available to hearing officers, including the placement of over 90 automatic magnetic card typewriters, so that decisions might be rendered more quickly. The first step of an automatic case control and case locator system has been installed and will, when installation is complete, allow for greater management control over the caseload and hopefully a reduction in the volume of reporting required by the hearing officers.

To further relieve the hearings officers of non-judicial functions and/or functions unrelated to the hearing of cases, the Bureau enlarged the professional support staff available to the hearings officers. Initially, experienced central office hearings and appeals analysts were detailed to the hearings officers to assist hearings officers in drafting decisions and obtaining needed medical evidence. In addition, a new program was instituted to hire recent law school graduates to continue and expand this professional staff support.

This latter program referred to as the Staff Attorney Support Program, was instituted in August 1975 with 160 law graduates atending in-depth train-

ing sessions throughout the country. Currently, there are over 200 of these Staff Attorneys with three located in the offices that service the State of Connecticut. Plans are underway to increase this to over 300 Staff Attorneys nationwide. The Staff Attorneys do not, of course, function as adversary counsel for the government. Rather, they serve a function analogous to that of a judical law clerk. The initial results of this program are quite favorable in terms of increasing the productivity of the administrative law judges to whom the legal assistants have been asigned.

The overall impact of all of these initiatives on the hearing process can be seen in the 62% national increase in performance from the lowest point in the fourth quarter of FY 1974 through the end of the first quarter of FY 76. Nationwide, average number of dispositions per hearing officer for the period September 13 through October 10, 1974, was 14.8; the average for the period September 14 through October 11, 1975, was 21.1. In the offices servicing Connecticut, there were also increases in production. For the period September 15, 1974 to January 4, 1975 (monthly figures not available) the average dispositions per administrative law judge was 14 in the Hartford office. For the period September 14, 1975 to December 6, 1975, the average rose to 20.3. In the Providence, Rhode Island office, for the same periods, the average increased from 11 to 15.2, respectively.[1]

[1] At the beginning of the latter period, one of the three Providence administrative law judges, an experienced administrative law judge, left BHA to assume a GS–16 administrative law judge position with another agency. The administrative law judge was replaced by an administrative law judge from the Hartford office who had only entered on duty with BHA in February, 1975. The loss of our Title II administrative law judges, who are classified by the Civil Service Commission at the GS–15 level, to other Federal agencies is a recurring problem. During the period of January, 1973, through April, 1975, 59 Title II administrative law judges separated from service; 14 of these were individuals assuming GS–16 administrative law judge positions. A class of 24 administrative law judges are entering training in January 1976. One of these administrative law judges is scheduled for the Providence office. These 24 entering administrative law judge training are all that could be obtained from an original request for 56.

Overall, the increase in productivity has resulted in a significant reduction of the backlog of pending cases at a rate of about 1,000 cases per month nationwide.

In addition, experience has shown that a substantial number of reversals at the hearing level occur as a result of a deterioration in the claimant's condition or the receipt of new and material evidence, and an "informal remand" procedure was devised in order to award benefits, if possible, without the necessity for a hearing. Accordingly, all pending hearings requests were recently screened for the possibility of immediate favorable action or to obtain additional evidence which could possibly result in such action. These were processed promptly and resulted in favorable action being taken in 5,500 cases. Also, steps have been taken to expedite favorable hearing decisions.

(5) Realizing that the Bureau of Hearings and Appeals was experiencing a significant problem Congress held extensive hearings during calendar year 1975. As a result of these hearings, Congress passed H.R. 10727 which was signed into law by the President on January 2, 1976, as P.L. 94–202. This law provides the Secretary of Health, Education and Welfare with authority to mold our three existing corps of hearing officers into one corps which can deal flexibly with the hearings workload. This will have a very beneficial impact on the social security hearing

workload. We anticipate that it will enable us within one year to reduce the workload to manageable proportions, so that a claimant's average waiting time for a hearing will not exceed ninety days.

(6) Our cumulative experience with the Title II hearings process suggests that a 90-day processing period represents the optimum period that can be expected where (1) oral hearings are held locally; (2) consultative medical examinations and other prehearings development may be required; (3) advance notice of the hearing must be provided; (4) arrangements must be made for appearance of expert witnesses, when required; (5) consultative medical examinations and other posthearings development may be required; and (6) time must be taken to prepare a well-reasoned decision based on a sound record. A 60 day processing time limitation would deprive a claimant of having the record fully developed and would result in cases being denied which could possibly be paid based on a consultative examination or the receipt of other additional evidence.

(7) It would be inappropriate for the Bureau to allocate a sufficient number of personnel to process hearing requests from residents of the State of Connecticut within 60 days as such action would interfere with the rights of other individuals who have filed requests for hearings. To do this for each claimant now awaiting a hearing in Connecticut would require that approximately 56 hearing officers be assigned to the area full-time for a 60 day period. This is equivalent to devoting all of the existing hearing officers in Region I and 60% of those in Region II, plus their supporting staffs, solely to the State of Connecticut for this period. These regions cover Massachusetts,

Connecticut, Maine, New Hampshire, Vermont, Rhode Island, New York, New Jersey, and Puerto Rico. The hearing situation in those places, presently not significantly different from Connecticut, would be substantially worsened.

DANIEL L. SCHULTZ,
Acting Director,
Bureau of Hearings and Appeals.

Subscribed and sworn to before me this 13th day of January, 1976.

MARILYNN H. GARRISON,
Notary Public.

My Commission expires: November 29, 1976.

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